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10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA

12 PERFECT 10, INC., a California corporation,

13 Plaintiff,

14 v.

15 GOOGLE, INC., a corporation; and
16 DOES 1 through 100, inclusive,

17 Defendant.

18 AND CONSOLIDATED CASE.

Case No. CV 04-9484 AHM (SHx)
 Consolidated with Case No. CV 05-4753
 AHM (SHx)

**PERFECT 10'S RESPONSE TO
 GOOGLE, INC.'S EVIDENTIARY
 OBJECTIONS TO THE
 DECLARATION OF JEFFREY
 MAUSNER RE GOOGLE'S MOTIONS
 FOR SUMMARY JUDGMENT**

BEFORE JUDGE A. HOWARD MATZ

Date: None Set (taken under submission)
 Time: None Set
 Place: Courtroom 14, Courtroom of the
 Honorable A. Howard Matz

Discovery Cut-Off Date: None Set
 Pretrial Conference Date: None Set
 Trial Date: None Set

1 Plaintiff Perfect 10, Inc. (“Perfect 10”) hereby responds to Defendant
2 Google Inc.’s (“Google”) Evidentiary Objections to the Declaration of Jeffrey N.
3 Mausner submitted by Perfect 10 on August 9, 2009 in opposition to Google’s
4 Motions for Summary Judgment Re DMCA Safe Harbor for its Web and Image
5 Search, Blogger Service, and Caching Feature (the “Mausner Declaration”)
6 (Docket No. 482), as follows:¹

7 **I. MR. MAUSNER’S STATEMENTS ARE STATEMENTS OF FACT,**
8 **NOT OPINION.**

9 Google’s Evidentiary Objections begin with its boilerplate paragraph setting
10 forth general requirements for admissibility of evidence, which Google admits may
11 not apply to the Mausner Declaration. Google then offers several unfounded
12 specific objections to the Mausner Declaration, all of which have no merit.

13 Google objects to Paragraphs 2-13 of the Mausner Declaration as
14 “irrelevant” because Mr. Mausner allegedly is expressing his “personal opinions.”
15 Evidentiary Objections at 2. In fact, Paragraphs 2-13 of the Mausner Declaration
16 express no opinion at all. They merely set forth, attach and authenticate
17 correspondence between Perfect 10 and Google regarding Google’s lack of
18 cooperation in setting up a Notification System as ordered by the Court. The *only*
19 statement that possibly may be considered opinion, but is also a statement of fact,
20 is Mr. Mausner’s statement that “Google’s willingness to cooperate to develop
21 such a system extended no further than its Preliminary Injunction brief.” Mausner
22

23 ¹ In addressing Google’s objections to the Mausner Declaration, the general
24 principles applicable to declarations submitted in opposition to summary judgment
25 motions should be applied, as discussed in Section I of Perfect 10’s Reply to
26 Google, Inc.’s Evidentiary Objections to the Declaration of Dr. Norman Zada,
27 submitted concurrently herewith, which is incorporated herein as if set forth in full.
28 For example, the Ninth Circuit has adopted a general principle with respect to
evidentiary objections for summary judgment motions that courts must “treat the
opposing party’s papers more indulgently than the moving party’s papers.” *Lew v.*
Kona Hosp., 754 F.2d 1420, 1423 (9th Cir.1985). *See also Scharf v. U.S. Att’y*
Gen., 597 F.2d 1240, 1243 (9th Cir.1979) (“courts generally are much more lenient
with the affidavits of a party opposing a summary judgment motion.”)

1 Decl., ¶4, page 1, lines 26-27. Even if the Court strikes this statement, it does not
2 alter the remaining facts and correspondence about which Mr. Mausner testifies in
3 Paragraphs 2-13 of the Mausner Declaration.

4 **II. MR. MAUSNER'S STATEMENTS ARE RELEVANT.**

5 Mr. Mausner's statements and authenticated exhibits are also *relevant*. The
6 fact that Google could have, but failed to, set up a notification system that would
7 have streamlined and expedited the removal of infringing material from its search
8 results is relevant to the issue of whether Google has taken simple measures to
9 reduce the damage to the copyrighted works of Perfect 10 and other copyright
10 owners. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007)
11 (“Applying our test, Google could be held contributorily liable if it had knowledge
12 that infringing Perfect 10 images were available using its search engine, could take
13 simple measures to prevent further damage to Perfect 10's copyrighted works, and
14 failed to take such steps.”). Mr. Mausner's testimony establishes that Google
15 failed to set up such a notification system even when it was under an Order from
16 this Court to do so. Google has recently set up a check-the-box type notification
17 tool to report offensive images, but not one to report infringing images.

18 Declaration of Jeffrey N. Mausner In Support Of Perfect 10's Evidentiary
19 Objections and Responses to Google's Evidentiary Objections Re Google's Three
20 Motions For Summary Judgment, filed concurrently herewith, ¶8, Exh. EE.

21 The details of Google's refusal or failure to assist in creating a notification
22 system are also relevant to determining whether Google has “adopted and
23 reasonably implemented ... a policy that provides for the termination of ... repeat
24 infringers.” 17. U.S.C §512(i). If Google had set up such a notification tool,
25 Google would now have computerized records of thousands of images allegedly
26 infringed by websites from which it copies images, many of which are AdSense or
27 Blogger affiliates. This tool would have given Google a straightforward method of
28 keeping track of, and terminating, repeat infringers. It also would have given

1 Google the ability to stop copying images for its Image Search results from known
2 infringers. Google's failure to implement such a notification tool or maintain
3 anything more than a fragmentary DMCA log is directly relevant to Google's
4 eligibility for safe harbor under the DMCA.

5 **III. GOOGLE'S OTHER OBJECTIONS ARE NEGLIGIBLE AND DO**
6 **NOT ALTER THE MAUSNER DECLARATION OR THE**
7 **UNDERLYING FACTS.**

8 Google's remaining objections to the Mausner Declaration are without
9 merit. First, Google's objections that certain statements of Mr. Mausner are
10 argumentative or irrelevant, including Paragraph 15 of the Mausner Declaration,
11 are unsupported and negligible.

12 Second, Google's objections to Paragraphs 16, 17, 18 and 28 of the Mausner
13 Declaration are incorrect. Mr. Mausner's statements in these paragraphs are based
14 upon his personal knowledge, establish a sufficient foundation, are not speculative,
15 and do not constitute improper opinion testimony.

16 Third, Google's objections to the exhibits to the Mausner Declaration lack
17 substance. The correspondence and letters attached as exhibits – all of which are
18 authenticated by Mr. Mausner – lay a foundation for facts relevant to the Summary
19 Judgment Motions: Google's position on certain matters or Google's action or
20 lack of action on certain matters. For example, Paragraph 17 of the Mausner
21 Declaration authenticates a letter establishing Google's position that it does not
22 have to remove or disable access to usenet sites (pay sites) upon receiving notice of
23 infringement. Paragraph 28 of the Mausner Declaration establishes that Google
24 will continue to publicize Perfect 10's DMCA notices on Chillingeffects.org. In
25 short, Google's assertion that certain language in the Mausner Declaration may be
26 argumentative does not alter the underlying facts evidenced by the correspondence
27 that Mr. Mausner authenticates in his declaration, or their relevance.

28 Fourth, Exhibits C, D, E, and G to the Mausner Declaration, to which

1 Google also objects, are admissible under the standard for opposing motions for
2 summary judgment. *See* Section I of Perfect 10's Reply to Google, Inc.'s
3 Evidentiary Objections to the Declaration of Dr. Norman Zada, filed concurrently
4 herewith. In particular, portions of depositions in the consolidated *Google/Amazon*
5 case, in which Google's attorney was present (Exhibits E and G), are clearly
6 admissible. A portion of the deposition taken in the *Microsoft* case (Exhibit D) is
7 also admissible to demonstrate that there is a triable issue of fact. Exhibit C is also
8 admissible under the lower standard for opposing summary judgment motions,
9 because it shows that admissible evidence of a triable issue of fact could be
10 introduced at trial; furthermore, the evidence in Exhibit C is to some extent
11 duplicative of clearly admissible evidence set forth in the Declarations of Margaret
12 Jane Eden (Docket No. 475), Les Schwartz (Docket No. 478), Dean Hoffman
13 (Docket No. 476), and C.J. Newton (Docket No. 477).

14 **IV. CONCLUSION.**

15 For the foregoing reasons, this Court should consider the entire Mausner
16 Declaration and the exhibits authenticated thereby, in ruling on Google's Summary
17 Judgment Motions.

18 Dated: October 12, 2009

Respectfully submitted,
LAW OFFICES OF JEFFREY N. MAUSNER

20 By: Jeffrey N. Mausner
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